

CONTESTED CONCEPTS IN CAMPAIGN FINANCE

Nathaniel Persily*

After the district court issued its judgment in *McConnell v. FEC*,¹ two familiar sayings competed in the race to become the decision's descriptive sound bite: "Be careful what you wish for," and "When you have three lawyers in a room, you end up with four opinions." Since November of last year, those of us who study campaign finance have been waiting and wondering when the district court would issue its opinion on the constitutionality of the Bipartisan Campaign Reform Act ("BCRA").² Now, six months after they heard arguments in the case, the three judges have given us four opinions totaling 1638 pages.

My remarks will focus on the constitutional controversy surrounding the BCRA's soft money provisions and the district court's attempted resolution of it.³ Two questions appear to be at the heart of this controversy. First, is the BCRA a law about corporations and unions or is it about political parties? The answer, of course, is that the law is about both, but the constitutionality of the law may depend on whether the Court focuses on the source of soft money rather than the fact that parties receive and spend it. Second, how should one think of corruption when it comes to political parties? Defining corruption is troublesome enough in the abstract, but when political parties enter the mix, they complicate the model of undue influence that has emerged from the precedent.

I. THE DISTRICT COURT OPINIONS CONCERNING THE SOFT MONEY PROVISIONS

Before asking these questions, it is worth reviewing briefly how the district court handled the soft money provisions. As several participants in this symposium have explained, the district court delivered a mixed bag when it came to the soft money provisions. Two judges

* Assistant Professor, University of Pennsylvania Law School.

¹ 251 F. Supp. 2d 176 (D.D.C.) (three-judge court), *prob. juris. noted*, 123 S. Ct. 2268 (2003) (mem.).

² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

³ Elsewhere I have discussed the specific provisions of the BCRA and the likelihood of success of the constitutional challenges. See Nathaniel Persily, *Soft Money and Slippery Slopes*, 1 ELECTION L.J. 401, 407 (2002).

(Judge Leon and Judge Henderson) found that individuals, corporations, and labor unions had a constitutional right to contribute unlimited amounts of money to political parties, while two judges (Judge Leon and Judge Kollar-Kotelly) found that the Constitution allows the government to ban parties' use of such money to fund activities that directly influence federal elections, specifically electioneering ads as defined by the law and redefined by Judge Leon. In short, Judge Leon's tie-breaking opinion concluded that a threat of real or apparent corruption arises only from parties' channeling of soft money into activities that directly affect election outcomes, but no such threat arises from the parties' mere receipt of such funds or spending of such funds on activities other than electioneering communications. Thus, the court's decision split the soft money baby: telling parties they can have all the soft money they want, but they cannot spend it anyway they wish.

Many in this symposium have criticized the district court's "resolution" of the soft money issue, but the judges' distinctive approaches highlight the inherent difficulties the precedent presents in characterizing soft money. Soft money stands at the intersection of almost every vague and contested concept in campaign finance law: the difference between expenditures and contributions, the definition of corruption, and the special constitutional character of political parties. The BCRA soft money provisions, on the one hand, appear as restrictions on contributions because they limit (indeed, ban) an entity's ability to contribute money to political parties. On the other, they appear like an expenditure restriction because they also prohibit a party from spending soft money on federal election activity. In addition, these provisions highlight the case law's conflicting definitions of corruption: one used in the special context of corporate political activity, another used for "run-of-the-mill" corruption. Normally, corruption is viewed as a contributor's "improper influence"⁴ over an officeholder; however, in the context of corporate contributions *and* expenditures, corruption morphs into "the corrosive and distorting effects" on elections caused by corporate political participation.⁵ Finally, soft money, because it is party money, brings to the forefront the question whether political parties deserve special constitutional treatment or whether they should be treated just like other associations in the campaign finance system. These cleavages in the case law emerged and distinguished the district court judges' conflicting opinions.

⁴ See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000).

⁵ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

II. IS THE BCRA ABOUT CORPORATIONS OR IS IT ABOUT POLITICAL PARTIES?

The soft money ban is like a hologram that appears to change as you walk by it: what one sees in the law depends on one's point of view. Its constitutionality may depend on whether one views the ban principally as a restriction on corporations and unions (and therefore likely to be upheld) or as a restriction on political parties (in which case it is more likely to be struck down). There is no question as to what the law does: it bans corporations and unions from making contributions to federal party committees from their treasuries,⁶ and it bans the parties' use of those prohibited funds for electioneering activities. Yet, focusing on the source of the funds may lead to a different constitutional result than focusing on the recipient of them.

If one views the BCRA principally as a restriction on corporations and unions, then the relevant cases are *Austin v. Michigan Chamber of Commerce*,⁷ *First National Bank of Boston v. Bellotti*,⁸ and, now, *FEC v. Beaumont*.⁹ Those cases together stand for the proposition that, with respect to candidate elections, corporate (and union) contributions and even expenditures may be banned. Because corporations are, to some extent, state-created entities with state-conferred advantages, such as limited liability, perpetual life, and favorable tax treatment, the First Amendment does not require that they be treated identically to individuals. Moreover, the Court has recognized a special corruption danger arising when corporate directors, unlike an individual or leader of a political association, contribute money from people (namely, shareholders) who do not support the candidate receiving the contribution. Instead of the typical "improper" or "undue influence" that appears in cases from *Buckley*¹⁰ to *Nixon*,¹¹ *Austin* described the special kind of corporate-sponsored corruption as "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."¹²

⁶ The soft money restrictions also limit individuals' contributions to political parties—a fact that usually receives less attention. This raises additional issues which will be discussed in the next section.

⁷ 494 U.S. 652 (1990).

⁸ 435 U.S. 765 (1978).

⁹ 123 S. Ct. 2200 (2003).

¹⁰ *Buckley v. Valeo*, 424 U.S. 1, 76 (1976) (per curiam).

¹¹ *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000).

¹² *Austin*, 494 U.S. at 660 (1990). I should note that the corporate corruption definition has been assumed to apply to unions as well, although one might question whether the arguments as to the unique structure and threat of corporations should apply to unions. See Persily, *supra*

The corporate exception to the general notion of corruption is limited by *Bellotti* to candidate elections, however. Emphasizing the importance to the listener, rather than the speaker, of the information presented and paid for with independent expenditures, *Bellotti* stands for the proposition that corporations may spend as much as they wish on initiative campaigns, and presumably genuine issue advocacy. The Court there did not preoccupy itself with the excessive influence or special organizational nature of corporations, but focused rather on the value of the information corporations conveyed to potential voters.

The tension in the corporate campaign finance case law explains the differences between Judge Kollar-Kotelly's and Judge Leon's opinions. Judge Kollar-Kotelly applied *Austin*'s logic to political parties' acceptance and spending of corporate contributions: if corporate expenditures in support of candidates present a unique threat of "corrosion" or corruption, as *Austin* recognized, then the same should be true of corporate contributions to parties. After all, elected officials direct the party committees, and contributions to the party have the intent and effect of improving party nominees' electoral prospects. Judge Leon took a different approach and split the soft money "issue" into two stages. He found that *Bellotti* controlled the use of corporate money on anything except campaign activity directly benefiting a candidate. Contributions to parties, by themselves, do not raise the specter of *Austin*-style corruption because such funds might be used for any number of activities unrelated to a candidate's election. *Bellotti* protects corporate contributions as they move through the system until they are spent directly for the candidate's benefit. Then, *Austin* kicks in and allows the state to prohibit the use of corporate funds to advocate for the election or defeat of a candidate.

Unlike those who viewed the soft money ban as governed almost completely by the corporate-campaign finance case law, Judge Henderson saw the case law concerning political party autonomy and associational rights as more relevant. Thus, like the plaintiffs, she saw the soft money ban as a restriction on political parties that invaded their core First Amendment rights of expression and association. Because soft money supports "party-building" activities, the argument goes, restricting it impairs the party's functions without any justification concerning corruption of candidates, a la *Austin*. By this logic, all contributions from any entity to political parties are constitutionally protected, but the state may regulate transfers of funds to candidates and perhaps the parties' spending of corporate and union

note 3, at 413. To my knowledge and dismay, no party to the litigation is making the argument that unions should be treated differently than corporations.

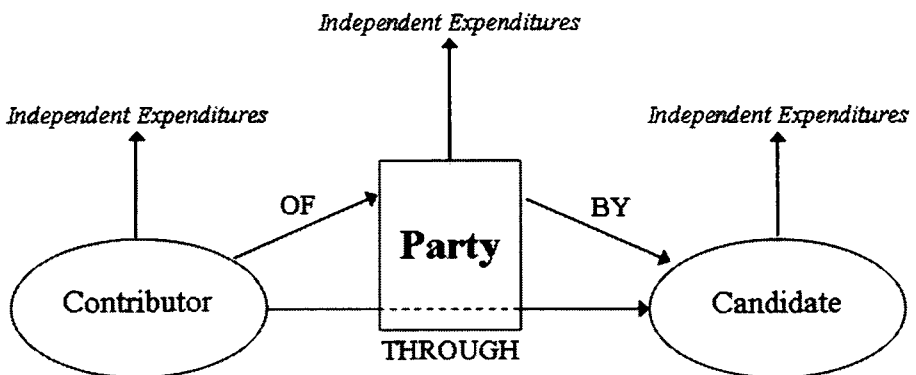
funds on express advocacy (which for Judge Henderson is limited to ads that use the magic words). No corruption threat arises, under this view, so long as the candidate does not receive corporate funds or does not otherwise directly benefit from corporate contributions to the party.

III. CORRUPTION AND POLITICAL PARTIES

This discussion of the party-centric view of the BCRA ties into another set of issues surrounding the concept of corruption as applied to political parties. Preventing corruption or preventing the appearance of corruption remain the only state interests the Supreme Court has permitted as justifications for limiting campaign contributions or, in the case of corporations, expenditures. However, the Court has not yet had occasion to consider the basic question as to whether contributions to political parties can be limited. Thus, one of the central questions surrounding the BCRA—whether corporate and union contributions to political parties can be banned and whether individual contributions to them can be limited—remains unanswered, despite the fact that the Federal Election Campaign Act (“FECA”) regime that existed before the discovery of the soft money loophole apparently did both. The case law gives us some hints as to how the Court might view this problem.

In applying the concept of corruption that emerges from the precedent for the BCRA litigation, it might be useful to conceive of three different types of corruption involving political parties: corruption of the party, corruption by the party, and corruption through the party. I have depicted these different types of corruption in the Figure below.

FIGURE 1: CORRUPTION OF, BY, AND THROUGH THE PARTY



A. Corruption by the Party

From the two Supreme Court party-campaign finance decisions involving the Colorado Republican Federal Campaign Committee,¹³ three basic positions have emerged on the Court. The prevailing view of Justices Souter, O'Connor, and Breyer treats political parties as just another species of interest groups, deserving no special constitutional protections nor subject to special burdens. Thus, the decisive plurality on the Court has interpreted the First Amendment as guaranteeing a party's right to make unlimited independent expenditures in support of a candidate¹⁴ while allowing restrictions on contributions from the party to the candidate that serve to combat real or apparent corruption.¹⁵ The two other camps on the Court treat political parties as having a special role in campaigns and a unique relationship to candidates that earns them different treatment than other groups.¹⁶ For Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia, parties' special relationship or "practical identity of interests"¹⁷ between parties and candidates argues for greater First Amendment protection of political parties, since their speech is constitutionally indistinguishable from that of their candidates. For Justices Stevens and Ginsburg, in contrast, this special relationship justifies greater regulation of parties by the government due to the risk of *corruption by the party*. As Justice Stevens explained in his dissent in *Colorado Republican I*, the "interdependency [between a party and a candidate] creates a special danger that the party—or the persons who control the party—will abuse the influence it has over the candidate by virtue of its power to spend."¹⁸

For those who view parties as indistinctive actors in the campaign finance system, parties are capable of corrupting candidates just as an individual contributor or association could. Thus, according to Justice Stevens,¹⁹ a special danger of *corruption by the party* exists because

¹³ See *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) ("*Colorado Republican I*"); *Colo. Republican Fed. Campaign Comm. v. FEC*, 533 U.S. 431 (2001) ("*Colorado Republican II*").

¹⁴ See *Colorado Republican I*, 518 U.S. at 608.

¹⁵ See *Colorado Republican II*, 533 U.S. at 437.

¹⁶ *Colorado Republican I*, 518 U.S. at 648 (Stevens, J., dissenting).

¹⁷ *Colorado Republican I*, 518 U.S. at 630 (Kennedy, J., concurring and dissenting).

¹⁸ *Colorado Republican I*, 518 U.S. at 648 (Stevens, J., dissenting). The FEC put forth this notion of corruption-by-parties in the *Colorado Republican* litigation, but the majority on the Court based its decision on the corruption-through-parties (or conduit corruption) rationale. See *Colorado Republican II*, 533 U.S. at 456 n.18.

¹⁹ *Colorado Republican I*, 518 U.S. at 648 (Stevens, J., dissenting). See also *FEC v. Colo. Republican Fed. Campaign Comm.*, 213 F.3d 1221, 1243 (10th Cir. 2000) (Seymour, J., dissenting) (agreeing with the FEC's argument that "limits on party contributions are necessary to prevent unscrupulous party officials from furthering their pet interests, thereby corrupting or appearing to corrupt the legislative process.").

the party is in a particularly good position to use its financial clout to unduly influence the positions taken by its candidates. Again, for those who see such a corruption danger, the original source of the parties funds (a corporation, union, individual, or bake sale) that influence a candidate is irrelevant: the problem arises merely from the real or apparent danger that the candidate may feel beholden to the party or its leaders because of the contributions he received.

Although this argument has its proponents in the FEC, on the Supreme Court, and among the defendants in the BCRA litigation, none of the district court opinions rests on the notion that parties can corrupt their candidates. Nonetheless, the current jurisprudence, which treats political parties almost as if they were SuperPACs capable of corrupting contributions and uncorrupting independent expenditures, suggests that parties, like other participants in the campaign finance system, can exert undue influence over their candidates. Of course, parties exist to exert “undue” or special influence over candidates both during the election campaign and once in office, such that the analogy to other groups fits uncomfortably. Nevertheless, proponents of the BCRA view the huge expenditure of party money on express advocacy, which has grown almost geometrically with each recent election, as a problem in and of itself. The awesome financial power of parties, under this view, threatens the independence of legislators and can tip the balance in favor or against a decision to take official action on legislation. With the power to pull the plug on a candidate’s campaign by refusing to spend soft money in the race may come the power to induce an elected official to toe the party line when her conscience or constituents might lead to a different result.

B. Corruption through the Party

The majority in *Colorado Republican II* and both Judge Leon and Judge Kollar-Kotelly’s opinions in *McConnell* concentrated on a different type of corruption: *corruption through the party*. Such corruption occurs when the parties become conduits for contributor influence: the contributor uses the party as a means to “corrupt” a candidate. As the Court in *Colorado Republican II* described this type of corruption:

[W]hether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders [T]his party role, which functionally unites parties with other self-interested political actors . . . provides good reason to view limits on coordinated spending by parties through the same lens applied to such spending by

donors, like PACs, that can use parties as conduits for contributions meant to place candidates under obligation.²⁰

Under this view, the party becomes a mere way station for money given by contributors seeking to gain influence over obligated officeholders. *Corruption through the party* occurs when money given to the party is funneled to the candidate and everyone involved knows the identity and intentions of the contributor.

In the BCRA litigation, the corruption-through-the-party argument served to justify limits on both soft money contributions to the party and soft money expenditures by the party. In the pre-BCRA world, according to the defendants and Judge Kollar-Kotelly, corporations, unions, and individuals would give soft money donations to the parties and the parties would spend that money on behalf of specific candidates on various federal election activities, including candidate specific ads that did not use the "magic words." If laws banning corporate and union expenditures on such activities are constitutional, as the BCRA proponents argue, it should also be constitutional to prevent parties from becoming the instruments of corporate and union spending for the benefit of candidates. Similarly, since limits on individuals' contributions to a candidate are constitutional, limits on individuals' contributions to parties prevent evasion of the candidate limits by restricting how much any given individual can funnel into the party for a candidate's benefit. For the BCRA's defenders and Judge Kollar-Kotelly, then, closing off both ends of the party conduit to corporate and union money and narrowing both ends of the conduit for individual contributions can be justified by the same anti-corruption rationales that support limits on contributions and bans on certain expenditures.

Because Judge Leon considered most corporate and union involvement in federal election activity constitutionally protected (except for express advocacy as he (re)defined it), he viewed party spending of soft money on those activities as unproblematic. Conduit corruption can occur, under this view, only if the candidate directly benefits from the funds given to the party. Incidental benefits the candidate might receive from party spending of soft money on such activities as voter registration and mobilization do not present a danger of real or apparent conduit corruption: the candidate allegedly will not feel beholden to a contributor whose money principally benefits the party and only indirectly benefits the candidate.

For Judge Henderson and the plaintiffs, no risk of conduit corruption justifies cutting off the flow of any money into and out of the party. They viewed money that goes into the party and is not coordi-

²⁰ *Colorado Republican II*, 533 U.S. at 452.

nated with or contributed to the candidate as immune from any potential for corruption. Therefore, despite the fact that corporate donations to the party might be spent on electioneering communications (minus the magic words), such election-related activities by the party were as constitutionally protected as independent expenditures. The conduit corruption argument only held, under this view, if the party used soft money for express advocacy with the magic words, for coordinated expenditures with the candidate, or for contributions to the candidate.

Each of the district court opinions made the mistake of treating corporate and union soft money donations to the political parties the same as individual soft money donations. Until now, I have generally referred to soft money as consisting of large corporate and union donations to a party. However, what we generally describe as “soft money” or “non-federal money” also includes individual contributions to the political party that exceeded the previous FECA limits but which the party spent on so-called “party building” activities, including electioneering communications that excluded magic words. It is important to distinguish individual contributions from corporate and union contributions because, as noted above, a different definition and threat of corruption applies to individuals and corporations or unions. An individual, unlike a corporation or union, has a constitutional right to spend unlimited funds on express advocacy.

When it comes to conduit corruption, one should first ask whether the source of the money that flows into the political party but flows out as an independent expenditure could be prohibited from making the same expenditures on its own. In other words, assuming the First Amendment, along with the special corruption threat of corporate corrosion of the political process, allows for regulation of corporate express advocacy according to the BCRA definition, then the party’s spending of corporate money could give rise to the same corruption threat and be similarly regulable. The same would not be true for the party’s spending of individual soft money contributions, however, because individuals could spend the money on such prohibited activities themselves. Given that individuals can make unlimited independent expenditures on most activities the BCRA defines as “federal election activity,” it is unclear why the threat of conduit corruption (i.e., using the party as a backchannel to achieve otherwise forbidden aims) could justify limiting a party’s spending of large individual contributions. It may be true, in reality, that regulating large individual contributions to political parties prevents circumvention of the individual contribution limits because party express advocacy is tantamount to a contribution. But so long as the Court adheres to *Buckley*’s distinction between contributions and expenditures, the individuals’ use of the party conduit for purposes other than contributions to candidates would seem to be con-

stitutionally protected.²¹

For similar reasons, one would suspect that corporations and unions do not enjoy a constitutional right to funnel money into a party for activities prohibited if done directly by those same corporations or unions. Yet the argument might not be as straightforward as it first appears. As noted above, the rationale for limiting corporate express advocacy depends on the special nature of corporations as beneficiaries of state benefits (limited liability, perpetual life, and favorable tax treatment), as having access to shareholder money (i.e., money that is not the directors' and was not intended to be used for politics), and, more amorphously, as giving rise to a unique corruption or "corrosion" threat given their immense aggregation of wealth. Some of these characteristics of corporations are mitigated, however, when corporate money is filtered through the party conduit. Although through winks and nods the corporate contributor may be able to "direct" the party to pay for ads that benefit a certain candidate, the ultimate control over the corporation's donations would lie with the party. Were the Court to view a party as having real control over corporate donations, then perhaps the "normal," rather than corporate, corruption test becomes relevant. If so, then a party's independent expenditures of corporate money are immune from state regulation for the same reasons they were in *Colorado Republican I*.

The Court's decisions in *Buckley* and *California Medical Association v. FEC*²² may undermine the argument presented here, however. Although the Supreme Court has never explicitly upheld a limit on contributions to political parties, *Buckley* upheld FECA's \$25,000 limit on the total amount an individual could contribute to candidates and political committees. The Court found the restriction justified as preventing evasion of the individual contribution limits: "[T]his quite modest restraint upon protected political activity serves to prevent evasion of the \$1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contribu-

²¹ To a certain extent this argument assumes that there is a constitutional right to make an earmarked contribution to a party. In other words, an individual can contribute as much as he wants to a party for purposes of independent expenditures, but an individual can be limited in the amount of money that he can give to a party that could then be directly transferred to a candidate. This would suggest that a party has a constitutional right to receive unlimited individual contributions but that the state can limit the amount that can genuinely be funneled through the party directly to the candidate. FECA and the BCRA do so by restricting the amount of money a party can contribute or coordinate with a candidate, thereby closing off the back end of the conduit.

²² 453 U.S. 182 (1981).

tions to the candidate's political party."²³ The Court adopted the same rationale in *California Medical Association* with respect to FECA's limits on individual contributions to PACs. The plurality opinion expressed the view that such limits were necessary to prevent the use of PACs as conduits for contributions to candidates. However, Justice Blackmun's critical concurrence explicitly distinguished the case of a PAC used as a conduit for contributions from one in which the organization receiving the contribution limited itself to independent expenditures.²⁴ Contributions to the latter were protected by the First Amendment. Thus, we are left without a specific answer to the question whether contributions given to a party for independent expenditures along the lines banned by the BCRA can be limited based on the possible threat of conduit corruption.

One other complication with the *corruption through parties* argument needs to be mentioned, although so far as I can tell this has not been articulated by anyone in the litigation. The conduit corruption argument cannot justify regulating the party conduit from both ends at the same time. In other words, if the laws shuts off one end of the party conduit then there is no anti-corruption justification left for shutting down the other end. Assume, for example, that the Court upholds the BCRA's ban on parties' spending soft money on federal election activities. How can it simultaneously appeal to the notion of conduit corruption to justify preventing soft money contributions to parties? Once the back end of the conduit (that is, from the party to the candidate) is closed with a prohibition on soft money expenditures, then no conduit corruption rationale remains to justify depriving the party of soft money to be used on other activities.

C. Corruption of the Party

To justify regulation of contributions to political parties, defenders of the BCRA do not rest their argument merely on the possibility that such contributions will be transferred (directly or indirectly) to candidates through the party conduit. Rather, a danger of real or apparent *corruption of the party* justifies limiting the sources and amounts of contributions to parties. Parties can be corrupted just like candidates, under this view: a contributor gives money and gets (or appears to get) official benefits in return. Just as the *corruption by the party* argument does not depend on the source of the money the party spends or contributes, though, this converse argument does not depend on what the party does with the contributions once it receives them. Simply stated, the argument suggests that soft money con-

²³ *Buckley*, 424 U.S. at 38.

²⁴ *Cal. Med. Ass'n*, 453 U.S. at 203 (Blackmun, J., concurring).

tributors gain undue influence over the party because of their contributions.

Of the three district court judges hearing *McConnell v. FEC*, only Judge Kollar-Kotelly appeared to buy the *corruption of the party* argument. For her, soft money contributors gained undue influence over governing officials as a result of their contributions, and the public perceived them as having such undue influence. Judge Leon and Judge Henderson rejected the argument and thus struck down all limits on contributions to political parties. As stated above, they only saw corruption when contributions were filtered through the party directly for a candidate's benefit. In a rare moment of harmony between them, though, all three judges agreed in upholding the ban on elected federal officials raising soft money, because such contributions raised the same corruption concerns as direct contributions to a candidate.

The difficulties in describing and analyzing the allegation that soft money corrupts parties arise from a disagreement as to who actually is corrupted by the soft money contribution and why they pay the contributor back with official favors. On its face, the analogy to individual candidate corruption has simplistic appeal: in each case money exchanges hands and the contributor gets paid back (or appears to get paid back) with official favors. Yet, it is quite difficult to discern exactly what we mean when we say that the "party" pays back soft money contributors. Presumably, we mean that elected officials change their official behavior (for example, positions or votes on bills) as a result of the contribution. To use V.O. Key's categorization of parties,²⁵ we mean that members of the party-in-government (that is, elected officials) perform official acts in return for contributions to the party organization (for example, the Democratic National Committee, or the Republican Congressional Campaign Committee).²⁶ However, these officials perform these services not for their own benefit, but for the benefit of the party. Their other-regarding behavior moves this type of corruption farther away from the paradigmatic cases of bribery or quid pro quo and closer to other types of political influence.

²⁵ See V.O. KEY, JR., *POLITICS, PARTIES, AND PRESSURE GROUPS* 163-65 (5th ed. 1964) (separating the concept of party into the party-in-government, party-in-the-electorate, and party organization); see also Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 778-79 (2000) (discussing Key's categories).

²⁶ In theory, the party organization itself could pay a contributor back by giving the contributor access and influence over party operations, by allowing the contributor to place a thumb on the scales when it comes to nominating decisions, or by changing a platform plank according to the contributor's wishes (e.g., dropping handgun reform from the platform once the NRA ponies up).

Moreover, it is somewhat difficult to discern what is meant by a contributor's "undue influence" over a party. The notion of "undue influence," difficult enough to define when it comes to candidates, becomes even more complicated when one tries to assess the baseline amount of influence an individual or party member should have over a political party. Political parties are quintessentially inegalitarian institutions: interest groups often gain influence over a party organization disproportionate to their membership in the party electorate. Moreover, parties receive contributions totaling hundreds of millions of dollars, such that a \$100,000 contribution would carry much less influence with the party than it would with the average House candidate who spends less than \$1 million on a campaign.

I do not want to overstate the argument against the notion of *corruption of parties*. It may be the case that giving money to parties is the most efficient way to gain influence over policy. A check that makes its way with implicit directives (e.g., "use this money to support prob tobacco candidates") to the chair of the party's congressional campaign committee can be used across a range of elections to support many candidates that share the contributor's views. Moreover, given the other threats and incentives party leaders have at their disposal to coerce compliance among members of the party in the legislature, gaining influence with such leaders through party contributions is a better use of a contributor's resources. A contribution to a candidate might "get" the contributor one vote, but a contribution directed toward a party leader, who can whip the other members of his party, might get the contributor several dozen votes.

Nevertheless, as with each form of "corruption" discussed here, this critique of party financing is as much a critique of political parties as it is of campaign finance. For those who suggest that parties corrupt candidates (*corruption by the party*), the use of money to exert influence over candidates is not qualitatively different than offering coveted committee assignments, party endorsements, or the like. The problem, if there is one, is with the party's influence over its members. Similarly, for those who see *corruption of the party* from soft money contributions, their fear of undue influence would apply equally to powerful, but often poorly funded, party factions that can "capture" the party. Perhaps those who see today's parties as money launderers (*corruption through the party*) do not have a problem with parties as institutions, but rather have nostalgia for a type of party that is more autonomously engaged in politics at the grass roots level. One might wonder whether those party machines of yesteryear, which thrived on patronage but certainly mobilized their base, were less corrupt than today's parties.

This is not to say that financial influence is identical to other types of influence; good arguments can be made that "money is different."²⁷ Rather, I am suggesting that the very purpose of a party is to be the repository and agent of "undue influence." Political parties are not microcosms of a larger democracy, and they are not merely one species of associations. They exist as complicated arrangements of interest groups in which a group's intensity of preferences and resources count as much as its size.²⁸ They are also in a unique position of influence with respect to the candidates that run under the party's label in the general election. It may very well be the case that large contributors unduly influence political parties, that parties unduly influence their candidates, and that parties serve as indirect avenues of influence over candidates by contributors. Ultimately, though, the arguments in favor of party finance reform may say more about Americans' historic dislike of factions and parties and reveal a hope that parties will play less of a role in politics and elections in the future.

²⁷ See Burt Neuborne, *Is Money Different?*, 77 TEX. L. REV. 1609, 1617 (1999).

²⁸ See Nathaniel Persily, *Toward a Functional Defense of Party Autonomy*, 76 N.Y.U. L. REV. 750, 810-11 (2001).